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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 65

VETERANS OF THE ABRAHAM LINCOLN BRIGADE,
Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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I. THE INSUFFICIENCY OF THE EVIDENCE.

A. As to Control.

In our main brief we pointed out at pp. 15-16 that Wolff and Fishman, the two principal officers of the petitioner who managed and directed its affairs from 1950 on were neither representatives nor functionaries

of the Party and that accordingly there was insufficient evidence to show that the petitioner was dominated and controlled by the Party, at least for the period since the passage of the Act, which is the only relevant period in question.

The government makes the following arguments in response:

a. That the court below found that petitioner's executive committee "had an important part in running petitioner" in the post-1950 period (Br. 65).[1] But the Board found on the basis of the undisputed evidence that the petitioner's affairs after 1950 were managed and directed solely by Wolff and Fishman (R. 107, 193). We do not think that the government can now justify the Board's order on the ground that findings made by the Board were erroneous.[2]

b. Secondly, the government asserts that the court below did not, "in fact, disagree" with the findings of the Board that Wolff and Fishman had been functionaries or representatives of the Party (Br. 62). In reply, we can only quote the opinion of the court below (R. 224): "The evidence does not show, so far as we can find, that Wolff or Fishman were functionaries

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[1] We treat in our main brief (pp. 16-17) with the erroneous nature of this finding of the court below.

[2] The government argues at length (Br. 52-55) that this Court should give deference to the findings of the Board and in any event should uphold those findings of the Board which were upheld by the court below. Despite this the government finds it necessary to ask the Court to reject findings made by the Board where they are helpful to petitioner and at the same time to uphold other findings made by the Board which were rejected b the court below.

within that definition[3] or that they held any official positions in the Party, or that they were picked by the Party."

c. Thirdly, according to the government (Br. 63) "any ruling by the court below that the Board's finding that Wolff and Fishman were functionaries was not supported by sufficient evidence would have been erroneous."[4] But the evidence which it recites in support of this contention amounts to nothing more than the fact that Wolff and Fishman were respectively National Commander and Executive Secretary of the petitioner and there was some evidence of their membership in the Party. Accordingly, argues the government, since the petitioner has been shown to have been Party controlled: "It could reasonably be inferred . . . that Wolff and Fishman were Party representatives when acting as officers of petitioner" (Br. 63-64). There are several fallacies in this reasoning. In the first place, there is nothing in the report to indicate that the Board shared this reasoning of the government.[5] It simply stated categorically without refer-

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[3] The definition referred to was that given by the government's witness Lautner, and one which the government here states is definitive as to the definition of "functionary" (Br. 71). Contrary to the government's contention, it does not appear from the Report of the Board that it employed that definition of "functionary," or that it employed any definition.

[4] As we have already noted, footnote 2, *supra*, although the government elaborately urges this Court not to review the record after it has been reviewed by the court below, the above is one of the numerous instances in which the government asks this Court to reject the findings of the court below.

[5] "The court may not accept appellate counsel's post hoc rationalizations for agency action." *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168.

ence to any evidence that Wolff was "established" as a Party functionary (R. 102) and Fishman was "identified" as a Party functionary (R. 108). Secondly, the reasoning is circular. On the one hand, the government asks the Court to find that petitioner was controlled and dominated by the Party because petitioner's principal officers were Party representatives. Then, it asks the Court to find that they were Party representatives because they were the principal officers of a Party-controlled organization. The substantial evidence rule clearly requires something more than this kind of flim-flam.

Further, the government misstates the evidence as to the period of the alleged membership of both Wolff and Fishman. The latest evidence that Wolff may have been a member of the Party was Budenz' testimony that Wolff attended a Communist Party meeting in 1941 (Tr. 2703, 2753-4). The sole evidence that Fishman had ever been a party member consisted of the testimony of one Huber that Fishman had admitted such membership to him (Tr. 1944-5, 2002-7). Huber could not recall when this occurred, and testified that it could have occurred any time between 1940 and 1947. Huber's faulty memory would be justification for disregarding his testimony entirely, but it cannot justify the government's contention that Fishman was a member from 1940 to 1941 and 1947. At most Huber's testimony might support a finding that Fishman was a Party member in 1940. Accordingly, there is no justification for the government's statement that the evidence shows that Wolff and Fishman were Party members as late as 1949 and 1947 respectively (Br. 60, 63-64). Nor is there any basis for the government to urge that the Court should give deference to the Board's

findings on this point. For the Board made no findings as to the period of the alleged membership of either Wolff or Fishman.[6]

d. Finally, the government argues (Br. 57-62) that even if it be conceded that the affairs of the petitioner during the post-1950 period were run by two officers who were neither functionaries nor representatives of the Party, that factor is not decisive and it was permissible nevertheless to find control on the basis of other evidence.[7]

There are several reasons why this position of the government is unsound.

In the first place, it appears from the Board's Report (R. 109), that its finding that Wolff and Fishman were functionaries of the Party was, if not decisive to its conclusion of control, at a minimum, a key element in that conclusion. Under standard principles of administrative law, once a key finding of the Board was re-

[6] The Board's Report, as a whole, shows virtually no recognition of the time element as a factor in its findings concerning Party membership. And as we show in our main brief (p. 17), despite its recognition that it was erroneous to disregard the element of time, the court below committed the same error.

[7] The court below seems to have adopted both points of view even though they are contradictory. On the one hand it stated (R. 222): "So the inquiries in this case upon the first half of the statutory definition are (1) whether persons active in the management, direction or supervision of the Brigade in 1950 or thereafter were authorized to do so by the Party; and (2) whether these persons were the dominant or key voices in the management of the Brigade." However, after finding that the dominant or key voices in the management of the Brigade as found by the Board, were not functionaries or representatives of the Party, it then went on to state (R. 226) that the Board could take into consideration all four statutory criteria "in determining the applicability of the whole of the statutory definition."

jected, it was not appropriate for the reviewing court to supply its own rationale to justify the Board's ultimate conclusion. *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80; *Burlington Truck Lines* v. *United States, supra*. Yet this is essentially what the court below did. The government's suggestion (Br. 93), that the court's rejection of this key finding of the Board, (i.e., that the only two active officers of the petitioner in the post-1950 period were either functionaries or representatives of the Party) is only a "minor difference" which may be ignored is patently frivolous.

Secondly, once the element of personnel as a method of control is eliminated, there is nothing left in this record to support a finding of control for the post-1950 period. There is no evidence and no findings by the Board which can possibly support a conclusion of control after the Act. And neither the government nor the court below points to anything significant in this respect. All we were told by the court below was that the Board was justified in arriving at such a conclusion "upon the record as a whole" (R. 229).[8] And the government repeats this view in several places (e.g., "all the evidence must be considered" (Br. 58) "the evidence, taken as a whole" (Br. 59), "all the evidence" (Br. 61). Indeed, it is impossible to tell either from the report of the Board, the opinion of the court below, or the government's brief exactly what their conclusion of control is based upon.

The statement that the Board was justified in finding control on the basis of "all the evidence," or "the record, taken as a whole" is not a rationale for the legal

[8] We show in our main brief (pp. 15-17) that the only specific item relied on by the court below, the 1952 letter, cannot possibly support a conclusion of control.

conclusion of control. Nor does deference to the alleged expertise of the Board require the Court to sustain the Board's ultimate conclusion solely on the ground that it is supported by the "record as a whole." As stated in *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167, the Court will not "accept such adjudicatory practice. . . . Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding; *expertise*,[9] the strength of modern government, can become a monster which rules with no practical limits on its discretion.' "

To urge, as the government does, that the Court should sustain the Board's finding of control because such finding is supported by the "whole record" or by "the evidence as a whole" is in effect to argue that petitioner is not entitled to judicial review. Obviously it is incumbent upon the government to show here that the findings made by the Board and which are supported by evidence led the Board by some rational route to the conclusion that the petitioner was controlled by

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[9] It should be noted that a good part of the Board's alleged "expertise" is directed to a discussion of the character of the Spanish Civil War (R. 1-73, 87-93), and its ultimate finding as well as that of the court below was in large part based on the view that that war was a struggle between Communism and Fascism. We submit that whatever field the Board may be expert in, it is no expert in history. Nor was it privileged to write the history of the Spanish Civil War solely on the basis of the testimony of ex-communists such as Louis Budenz and John Lautner, neither of whom were ever in Spain. Significantly, the government in its statement (Br. 8) makes much of the Board's finding, based on the boastful assertions of the Communist Party that the "overwhelming majority" of the Americans who fought in Spain were Communists. The New York Times, on the other hand, in a contemporaneous account, put the number of Communists in the American forces at about a quarter of the total (Pet. Exh. 56).

the Communist Party. In the absence of such showing, and there is none, the Board order cannot stand.

Moreover, the invalidity of the governments reliance on "the record as a whole" as proof of control is emphasized by the vagueness and inaccuracy of the few specific references it makes to that record. Thus, as we have shown, it is incorrect to say that there was evidence that Wolff and Fishman were Party members as late as 1949 and 1947 (Br. 60). The government adds, as persuasive of control, that there was "no indication of any change in their activities thereafter." (Br. 60) But if neither had any activities prior to 1950 to show that they were functionaries or representatives of the Party, no significance can be attached to the fact that they had no such activities after that date.

The same defect appears in the lower court's summary of evidence which it offers as sustaining the Board's conclusion of control. The crucial portion quoted by the government (Br. 60-61) contains only the vaguest generalities plus one crucial misstatement of fact. According to the court, petitioner had the same officers in 1950-1954 as it had prior to 1950. In fact, of the two officers, only one, Wolff, had been in office prior to 1950. Fishman, who as the Board found (R. 106) and the record shows (Tr. 3541-2, 4335-8, 4408), was the controlling, managing individual in the affairs of the petitioner after 1950, had not been an officer of the petitioner prior to that date.

B. As to Aid and Support.

In our main brief (pp. 20-21) we set out all of the post-1950 activities of the petitioner and we argued that it was impossible to conclude, on the basis of those activities, that the petitioner, during this critical period, gave aid and support to the Party. The govern-

ment does not dispute the accuracy of our statement of the facts. It argues only (Br. 68) that if "petitioner operated before 1950 primarily to give aid and support to the Communist Party, all that the evidence concerning events after 1950 need show is that petitioner's character did not substantially change."[10]

But on the government's own statement, petitioner's character did substantially change after 1950. Without conceding the accuracy of the government's recital of the petitioner's pre-1950 activities, it is significant to note the items upon which the government relies as showing that the petitioner aided and supported the Party during that period. According to the government (Br. 67) prior to 1950 the petitioner (1) acted as a reservoir of trained Party members, (2) immediately conformed its policies to reversals in those of the Communist Party, (3) worked in coordination with other Communist mass organizations, (4) acted as a joint sponsor of a Party crusade, (5) worked to increase *Daily Worker* subscriptions, (6) took part in Party picket lines and parades, (7) took part in fund raising events and other Party functions.

But petitioner after 1950 did none of these things. Obviously, if petitioner, after 1950, did none of the

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[10] The government took essentially the same position on the issue of Party support to the petitioner. We showed in our main brief (p. 26) that the sole evidence of Party support of the petitioner after 1950 consisted of three items of publicity in the Daily Worker. The government does not dispute this. Instead it argues (Br. 75) that the existence of Party support for petitioner prior to 1950 "goes a long way toward establishing the continuance" of support after 1950. Further, there is no merit in the government's novel argument (Br. 74) that the absence of financial support from the Party serves only to prove that an organization is a successful "Communist front." We prefer the more rational, albeit commonplace view, undoubtedly shared by Congress, that an organization is controlled by those who hold the purse strings.

things which the government says it did prior to 1950 and which formed the basis for its conclusion that it aided and supported the Party, then its character must have substantially changed.

II. THE MEANING OF AID AND SUPPORT.

We argued in our main brief (Br. 20-21, 30-32, 49-51), that the proper construction of the second half of the statutory definition requires a showing that the organization gives aid and support to the objectives of the Communist-action organization as defined in Sec. 2 of the Act. The government's reply to that contention is contained in its brief in the companion American Committee case, No. 44 at pp. 71-82. In essence, its position is that the aid and support portion of the definition can be satisfied merely by showing that the organization took a policy position on some public issue similar to that espoused by the Communist Party. In other words, if the Communist Party opposed the Internal Security Act, any organization that also opposed the Internal Security Act gives aid and support to the Party. Similarly, since both the Communist Party and the petitioner opposed the Franco regime, the petitioner thereby gave aid and support to the Communist Party.[11] According to the government this

[11] According to the majority below (R. 228) such a similarity of views does not constitute aid and support to the Party, if the views are espoused "as a matter of independent conviction," but does constitute aid and support if done for that "purpose." This, the Court added, was a "question of fact" to be resolved by the evidence. Although we challenged that interpretation of the statute, we argued in addition (Br. 19, 32) that there was no evidence in the record, and no Board findings that these post-statutory activities were taken for the forbidden purpose and not "as a matter of independent conviction." The government in reply, points to no evidence that can justify an adverse finding against petitioner under this test. It states only (Br. 82) that the "Board answered the court's question . . . by its ultimate finding."

follows from the nature of Communist-fronts. In a thesis which it elaborately develops in Appendix B of its Brief filed in the American Committee case, the government argues that the Communist Party employs Communist-fronts which promote only innocent objectives in order to promote the ultimate evil and illicit objectives of the Communist Party and of the world Communist movement, i.e., overthrow of the government by force and establishment of a totalitarian dictatorship. But if this reasoning is to have any validity as applied in these cases, the alleged Communist-fronts must do something more than merely promote the innocent objectives. For example, if, according to the government, the Communist Party used the petitioner as a vehicle to utilize legitimate anti-Fascist sentiments in order to promote the ultimate illicit objectives of the Communist Party, then it does not make out a case by merely showing that the petitioner opposed Franco. There must be some evidence to show how the non-communist support of non-communist objectives, e.g., anti-fascism and opposition to Franco, leads to the support and achievement of alleged communist objectives, e.g., the overthrow of the government and the establishment of a totalitarian dictatorship subservient to the Soviet Union.

The issue in the present cases is not how communist-fronts operate generally, but whether petitioners are such organizations. And since there is concededly no evidence that petitioners espoused the evil objectives attributed to the Party or caused non-communists to do so, then the government's elaborate argument that the communist-fronts encompassed by the Act operate in that fashion, only serves to prove that the petitioners are not such organizations.

Implicit in the government's argument is the premise that petitioners must necessarily have advanced the

sinister objectives described in Section 2 of the Act because they are Communist fronts. But this only begs the question. What was required to be proved in these cases was that petitioners were Communist-fronts as defined in the Act. The government's own description of Communist-fronts shows that this could be done only by evidence, totally lacking in these cases, that petitioners were operated to promote those sinister objectives. The essential gap in the evidence cannot be supplied by the government's theorizing on the nature of Communist-fronts generally.[12]

The invalidity of the government's interpretation of "aid and support" is highlighted when one turns to the government's argument in support of the constitutionality of this section of the Act. Here we find no argument that the Board may constitutionally proscribe organizations because they agree with the Communist Party in opposing Franco, or defend Communists or alleged Communists in deportation proceedings. On the contrary, we are told that the Act is constitutional because it is aimed at the evil which is "nothing less than the threatened destruction, through force, violence, and deceit, of our constitutional form of government, the loss of our national independence and of our cherished liberties and the passing of the nation

[12] In Appendix C of its brief in the American Committee case, the Board lists, with a brief description, all of the organizations which were found to be Communist-fronts by the Board. With the exception of the two petitioners currently before this Court, and the National Council of American-Soviet Friendship, all of these organizations were destroyed by the proceedings before the Board and accordingly went out of existence before they were able to obtain judicial review. As the government correctly notes (Br. 227), the Board's finding in the National Council case was reversed by the Court of Appeals for insufficiency of the evidence. *National Council of American-Soviet Friendship* v. *Subversive Activities Control Board*, 322 F. 2d 375.

under the domination of a ruthless foreign dictatorship" (American Committee case, Br. 121). And later (*id* at 126), the government tells us that the provision of the Act relating to communist-fronts can be constitutionally sustained because "they [Communist-fronts] are indirectly, but plainly, under the control, and carry out the purposes of the world Communist movement just as much as Communist-action organizations." And at p. 130 of the same brief we are told that "While such organizations' activities may be peaceful and not in violation of any criminal law at a particular time, Congress has the constitutional power to require disclosure from such organizations which are actively working for overthrow of the Government."

The government cannot have it both ways. If the constitutionality of the Act is to be sustained on the ground that it is directed only against organizations which are "actively working for overthrow of the government," then the government must prove in each case in which it argues that the Act applies, that the organization branded as a Communist-front is "actively working for overthrow of the government." Admittedly, there is no such evidence in either of the present cases before the Board.

Respectfully submitted,

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